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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1983

WILCOX COUNTY BOARD OF EDUCATION, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA, WILLIAM P. THOMPSON, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

W. McLEAN PITTS
Post Office Box 722
Selma, Alabama 36701
Counsel for Petitioners

Of Counsel:

L. Y. SADLER, JR.
Post Office Box 516
Camden, Alabama 36726

J. GARRISON THOMPSON
PHILIP HENRY PITTS
Post Office Box 722
Selma, Alabama 36701

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Come the Wilcox County Board of Education and its individual members, viz.: R. E. Lambert, Jr., L. Y. Sadler, Jr., Harry A. Mason, Erskine D. Kennedy, and Gerald L. Wright, and Morris T. Ward, Superintendent, of the Wilcox County Board of Education, and pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered on, to-wit: May 2, 1974.

CITATION OF OPINION BELOW

The Opinion and Order of the United States Court for the Southern District of Alabama dated September

26, 1973, is printed in Appendix No. 3 hereto and is not reported.

The Opinion of the Court of Appeals which affirmed in part, reversed in part, the Judgment or Order of the United States District Court for the Southern District of Alabama, is printed in Appendix No. 2 hereto and is not yet reported in the official Reports or Advance Sheets as of the date of the preparation of this Petition.

JURISDICTION

The Judgment of the Court of Appeals, printed in Appendix No. 3 hereto, was entered on, to-wit: May 2, 1974.

On May 16, 1974, Petitioners (Appellees below) filed a Petition for Rehearing in Banc in the Circuit Court of Appeals for the Fifth Circuit and the Court denied said Petition on June 7, 1974.

On June 13, 1974, Petitioners (Appellees below) filed in the Circuit Court of Appeals, Fifth Circuit, a Motion for Recall and for Stay of Mandate, pending the filing of this Petition for Writ of Certiorari.

As of the date of the preparation of this Petition, Counsel were notified by the Clerk of the United States Court of Appeals for the Fifth Circuit that the Motion for Recall and for Stay of Mandate would be considered by the Court on June 25, 1974. In the event it is denied by the Court, application will be made to the Supreme Court for recall and stay of the mandate.

The jurisdiction of the Court is invoked under 28 U.S.C. 1254 (1).

THE QUESTIONS PRESENTED

1. Where the Wilcox County school system in the Fall 1973 session enrolled 3,733 black and 109 white students, did the decision of the Court of Appeals disallowing "minority-to-minority" transfers into one of the 12-grade schools of the School District, deprive minorities of due process under the Fifth Amendment to the Constitution of the United States or equal protection under the Fourteenth Amendment to the Constitution of the United States?

2. Did the decision of the Court of Appeals denying "minority-to-minority" transfers into one of the 12-grade schools of the School District, deny minorities the equal opportunity to associate with all elements of society, and was the decision contrary to the decision of the United States Supreme Court in *Brown* v. *Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873?

3. Where in a rural county, economically among the Nation's poorest, at the time of filing a school desegregation case in 1965, the totally segregated county school system had an enrollment of 4,300 black children and 1,500 white children, and after orders of desegregation and in the Fall 1973 session in a totally integrated system, there was an enrollment of 3,733 black and 109 white students, was the District Court correct in allowing "minority-to-minority" transfers into one of the 12-grade schools of the system in an effort to prevent a totally segregated black system and to grant to minorities due process under the Fifth Amendment to the Constitution of the United States or equal protection under the Fourteenth Amendment to the Constitution of the United States?

4. Did the Court of Appeals commit error in reversing the decision of the District Court denying "minority-to-minority" transfers into one of the 12-grade schools of the system of Wilcox County, Alabama, economically among the Nation's poorest counties, in an effort to prevent the school system from becoming a totally segregated black system and to assure minorities due process under the Fifth Amendment to the Constitution of the United States or equal protection under the Fourteenth Amendment to the Constitution of the United States, where at the time of the filing of a school desegregation suit in 1965, the totally segregated school system had an enrollment of 4,300 black children and 1,500 white children and after compliance with Court Orders of desegregation in the Fall 1973 session, in a totally integrated system, there were only 109 white children in the entire system and 3,733 black children?

5. After a school system has complied with all Court Orders and the system has become a totally integrated system, does the Court have jurisdiction to force upon the Wilcox County Board of Education a plan of education, establishment of curricula, qualification of instructors, expenditures, school management, teacher ratio, transportation system, and the educational processes that arise on a day-to-day basis, all totally unrelated to the integration of the school system?

6. Does the jurisdiction of the Federal Court cease when a system has become totally integrated by compliance with Court Orders or does the Federal Court continue to have jurisdiction of the school system to force upon the school system a plan of education, establishment of curricula, qualification of instructors, expenditures, school management, teacher ratio, transportation system, and educational processes that arise on a day-to-day basis?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are:

1. Due Process Clause in the Fifth Amendment to the Constitution of the United States, the provision of which is set out in Appendix No. 1 hereto.

2. The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, the provision of which is set out in Appendix No. 1 hereto.

STATEMENT OF THE CASE

Litigation in this case began on November 22, 1965, when the United States of America filed a Complaint against the Wilcox County, Alabama, Board of Education, the then members and Superintendent of said Board, and others. The Complaint was filed pursuant to the 1964 Civil Rights Act and sought desegregation of the Wilcox County, Alabama, schools. At that time approximately 4,300 black children attended the 15 all-black schools and 1,000 white children attended the 3 all-white schools.

Through the years additional parties were added, other parties were allowed to intervene, others were substituted in lieu of the originals, appeals were filed, schools were consolidated, and plans and alternate plans were submitted. Most of these proceedings had little to do with the issues here presented except that while these activities were occurring, by September of 1973, and after compliance with Court orders of desegregation, the system had 3,733 black students and 109 white students. All but four (4) of the white students were concentrated in one (1) school. In that one school were 466 black students. Although

there were no longer any all-white schools, there remained nine (9) all-black schools.

In an Opinion on a prior appeal, the Fifth Circuit, on January 10, 1972, ordered the District Court, among other matters, to implement a system of "majority-to-minority transfers of students." As a result of hearings held subsequent to that mandate of the Fifth Circuit, the District Court found the prior plans had served only to diminish the number of white students in the system and to further pursue the matter in the same way would result in "driving more, if not all, of the remaining whites out of the system." The District Court therefore concluded:

> ". . . that the only practicable, workable plan for the present is the establishment of one school to which the small minority of whites may go so long as they remain in the minority."

The District Court went on to order:

> "That at the Wilcox County High School in Camden, Wilcox County, Alabama, there is established a school consisting of Grades One (1) through Twelve (12) with a minority to minority transfer privilege thereto by all students in Wilcox County with transportation being provided by the Wilcox County Board of Education."

In its Opinion the District Court also adopted provisions of the Title IV Unit Plan of the University of South Alabama and some provisions of the Plan submitted by the Wilcox County Board of Education. These Plans would inject the Court into a day-to-day administration of the schools, the establishment of curricula, the determination of qualifications of instructors, transportation, a county-wide biracial Advisory Committee, textbooks to

be used, levying of taxes, preparing budgets, taking and filing of inventories, curtailing capital expenditures, teacher assignments and transfers, preparing student handbooks, providing janitorial services, etc.

The United States appealed the decision of the District Court and urged that the District Court had erred in inserting the "minority-to-minority transfer procedure" in its Decree and further by failing to order the total implementation of the Title IV Plan. The Fifth Circuit Court of Appeals, in its Opinion of May 2, 1974, agreed with these contentions of the United States and held that the District Court had committed error in adopting the "minority-to-minority" transfer provision. The Fifth Circuit, in its Opinion, further directed the District Court to cause to be created a county-wide Advisory Council to see that an efficient, non-discriminatory transportation system for the County was devised and generally made the Title IV Plan dealing with the matters above stated to be the standard to be applied in the future by the District Court.

REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit Court of Appeals has, by its decision of May 2, 1974, decided important questions of Federal Law which have not been, but should be, settled by the United States Supreme Court.

2. The questions presented are of national importance to United States citizens and school districts.

3. The decision of the Fifth Circuit Court of Appeals is contrary to the decisions of the United States Supreme Court in *Green* v. *County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 and *Swann* v. *Charlotte-*

Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, in that desegregation plans must be calculated to work realistically and immediately.

4. The decision of the Fifth Circuit Court of Appeals was contrary to its own decision in *Singleton* v. *Jackson Municipal Separate School District* (*St. John the Baptist Parish, Louisiana*), 419 F.2d 1211.

5. The refusal of the Fifth Circuit Court of Appeals to approve a "minority-to-minority" transfer provision of the District Court's decision denied the minority due process of law under the Fifth Amendment to the Constitution of the United States.

6. The refusal of the Fifth Circuit Court of Appeals to approve a "minority-to-minority" transfer provision of the District Court's decision denied the minority equal protection under the Fourteenth Amendment to the Constitution of the United States.

7. To define the extent to which a Court may go to enforce plans on a school board where the system has been totally integrated and there is no proof of discrimination.

ARGUMENT

I

Minority-to-Minority Transfer Provision

In the landmark decision of *Brown* v. *Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, this Court resorted to certain intangible considerations in determining whether separate but equal facilities deprived minority children of equal educational opportunities. For example, in that Opinion it was observed by the Court:

> "Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:
>
> > 'Segregation of white and colored children in public schools has detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.' "

Brown therefore teaches that a most important phase of the educational process is the association of opposite races with the resulting awareness of their culture, feelings, and problems. Such association assists in attaining some of the goals of education as recognized in *Brown*, viz.: awakening children to cultural values, preparing them for later professional training, and helping them to adjust normally to their environment. The essence of *Brown* is that minorities are deprived if they are denied equal opportunity to associate with all elements of society.

During the years the litigation concerning Wilcox County has been pending in the Courts, a striking decrease in the number of white children attending the public schools has been experienced. When the litigation commenced in November of 1965, there were approximately 1,000 white children in the system as opposed to approximately 4,300 black children. These figures steadily deteriorated until at the beginning of the 1973-74 school year a mere 109 white children were enrolled. At the same time there were 3,733 black students. Of the 109 white students, 105 were concentrated in one school. In this one school were also 466 black students.

The District Court wisely recognized the importance of association between the races and also recognized that the implementation of either the Title IV Plan or the Wilcox County School Board Plan would result in driving most, if not all, of the few remaining whites from the public school system. The District Court observed that parents of the remaining white students simply did not allow their children to be the only child in a school or class. In order to prevent the final exodus of the remaining whites, the District Court devised the "minority-to-minority" transfer provision. To do otherwise would result in a totally all-black school system. Such a system cer-

tainly would not measure up to the standards adopted by this Court in the cases of *Green* v. *County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, requiring desegregation plans that promised to work both realistically and immediately. Clearly any plan which drives out the few whites remaining in the system is neither realistic nor calculated to immediately remove the vestige of segregation. Indeed it would serve only to maintain total segregation. In addition, such a plan does nothing to advance the aims of education for either black children or white children, small though that progress may be, as stressed in *Brown* v. *Board of Education*, supra.

In *Green* v. *County School Board*, supra, this Court recognized that "freedom of choice" might well be an available means of achieving a unitary school system. In that decision the Court said:

> ". . . there may well be instances in which it can serve as an effective device. Where it offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, non-racial system there might be no objection to allowing such a device to prove itself in operation. On the other hand, if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice' must be held unacceptable."

It is submitted by Petitioners that there are no other ways by which the Wilcox County school system can be converted into a unitary nonracial system. To compel the few remaining whites to be absorbed in the black

schools will, by past experience, result in a totally black school system.

Provisions relating to "majority-to-minority" transfers were expressly approved by this Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, supra. Under such provisions students of a majority racial group can transfer to other schools where they will be in a minority. Under this option a black student, being a member of a majority group in Wilcox County, could presumably transfer to any other school in the system. Petitioners say "presumably" since there is no school in the Wilcox County system in which the black student would be in a minority. To deny the white student, who is in the minority, the right to transfer to a school where he is still in a minority, denies the white student the right to due process under the Fifth Amendment to the United States Constitution and the right to equal protection under the Fourteenth Amendment to the United States Constitution.

The decision by the Fifth Circuit Court of Appeals in the instant case was most surprising due to the fact the same Court had previously approved a "minority-to-minority" transfer provision in the case of *Singleton* v. *Jackson Municipal Separate School District* (*St. John the Baptist Parish, Louisiana*), 419 F.2d 1211. In one of the schools in St. John the Baptist Parish, there were 1,626 black students and 156 white students. All of the whites under a "freedom of choice" plan, attended the same school with 406 black students. The Fifth Circuit in that case held that it was unnecessary to divide the "small number of whites, already in a desegregated minority position, amongst the five schools." It is submitted by Petitioners that the facts of the case at hand are practically indistinguishable from those in the St. John the Bap-

tist decision. It would therefcre appear the Fifth Circuit has overruled its prior approval of "minority-to-minority" transfer provisions.

Inasmuch as this Court has not yet passed on the issue of "minority-to-minority" transfer provisions in desegregation plans, this is a case of first impression and one that is of considerable importance in the area of school administration and pursuant to Rule 19 of the Supreme Court Rules should be given considerable weight in determining whether or not a Writ of Certiorari should be granted.

II

Extent of Court Involvement in Plans

Segregation or the dual system in the Wilcox County school system is dead and has been buried. There is no invidious racial discrimination now in existence in the Wilcox County system. In the landmark case of *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, this Court said:

> "In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults."
>
> * * *
>
> "When a system has been dual in these respects, the first remedial responsibility of school authorities is to eliminate invidious racial distinctions."

The Wilcox County school authorities, under various plans for desegregation implemented by the Court, have complied fully with the Courts' Decrees and said plans, the result of which there has been eliminated invidious racial distinctions in the entire school system. Although in 1965 Wilcox County had a dual system, no longer is it possible to identify a school as a "white school" or as a "Negro school," and this is true independent of student assignment. A school cannot be so identified by the racial composition of the teachers and staff, the quality of school buildings and equipment, or organization of sports activities. The quality of education that is now being administered in the Wilcox County system compares favorably, if not better, than the quality of education that was administered under the dual system.

It now seems to be the sole goal of the United States and the Intervenor Plaintiffs to establish in Wilcox County, Alabama, a system of education that would be comparable to a system of education in the richest city of the United States. The question of integration or desegregation of the school system no longer exists; it has been completely accomplished. If some action is not taken, the system will be resegregated to an entirely black system. The Title IV Plan of the University of South Alabama, sought to be enforced on Wilcox County by the United States and the Intervenor Plaintiffs, goes into considerable detail in reorganizing and restructuring the entire educational process of Wilcox County, as well as the tax structure of the County. The Plan is a professional educators' "utopia" for the third poorest county in Alabama and the thirteenth poorest county in the United States. It is economically impossible for the Wilcox County system to install such a plan. Bear in mind at the time of the submission of the Plan, there had already been eliminated invidious racial distinction in the entire school system.

This has ceased to be a "school desegregation case," and has now become a simple case of the attempt by the United States and Intervenor Plaintiffs to upgrade education in Wilcox County to compare with the Nation's richest school district.

Is there still any constitutional question involved after the school system has become a unitary system and all vestiges of a dual system have been eliminated? We submit that the District Court does not have the authority to place into operation the Title IV Plan which is both impracticable and economically impossible for the Wilcox County system. The Supreme Court should grant the Writ of Certiorari in order to clearly define how long a Federal Court can continue to force educational plans, totally unrelated to the desegregation process, on school systems that have completely eliminated invidious racial discrimination in the entire system.

We recognize the doctrine that District Courts should retain jurisdiction in school segregation cases to insure (1) that a constitutionally acceptable plan has been adopted and (2) that it is operated in a constitutionally permissible fashion so that the goal of a desegregated, nonracially operated school system is rapidly and finally achieved. *Raney* v. *Board of Education of Gould School District,* 391 U.S. 443, 88 S.Ct. 1697. However, Wilcox County has achieved both of the above requirements and the Plan of the Title IV Unit of the University of South Alabama is unrelated to a segregation plan and is only a plan to upgrade education in Wilcox County.

The involvement of the Court in the problem of desegregation is a constitutional one and does not and should not require the Court to become involved in the educational processes that arise on a day-to-day basis. The United States and the Intervenor Plaintiffs have argued,

in substance, that the District Court should compel the adoption of the entire Title IV Plan. To do so could inject the District Court into the day-to-day administration of the schools, the establishment of curriculum, the determination of qualifications of instructors, etc. The District Court is ill-equipped to undertake this burden, and it would be beyond the scope of its authority. The constant meddling of outsiders and of governmental agencies, all under the blessing of the District Court, have all served to contribute to the demise of public education as a reality in Wilcox County. At last all vestiges of a dual system have been eliminated under these plans. To this end, they have served the purpose for which the District Court intended, but the time has now come to end the District Court's being substituted for the school authorities in Wilcox County. The United States and the Intervenor Plaintiffs admittedly are no longer interested in the integration of the schools because this has been completely accomplished. They are now solely interested in the day-to-day operation of the school system and have appointed themselves as guardian of the Wilcox County system. It is very plain that the people of Wilcox County understand if there is any infringement on the constitutional rights of any of the students, a complaint can be made to the District Court and action will be taken immediately. This is evidenced by the fact each time during the period of the desegregation of the schools that any complaint was made to the District Court, it was promptly investigated by the District Court and in many instances the District Court found the complaint to be unfounded and not substantiated by evidence.

It is recognized in fashioning and effectuating the Decrees, the Courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical

flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. *Brown* v. *Board of Education of Topeka, Kansas*, 349 U.S. 294, 75 S.Ct. 753.

In *Green* v. *County School Board of New Kent County, Virginia*, 391 U.S. 430, 88 S.Ct. 1689, the Court said:

> "The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance."

Once a right and a violation have been shown, the scope of a District Court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies. *Swann* v. *Charlotte-Mecklenburg*, supra. The District Court, in its Decree and in prior Decrees, has exercised the equitable power of the Court and the District Court saw fit in its Decree of September 26, 1973 (see Appendix No. 3), not to adopt the entire Title IV Plan and specifically stated as one of the reasons it was economically impractical. It is important in view of the Circuit Court's decision that this Court grant the Writ of Certiorari in order for this Court to pass upon the question as to how far a District Court should go in establishing plans of education in a school system wherein all vestiges of a dual system have been eliminated and there is no indivious racial discrimination.

CONCLUSION

The Petition for Writ of Certiorari should be granted for the reasons hereinabove set forth.

Respectfully submitted,

W. McLEAN PITTS
Post Office Box 722
Selma, Alabama 36701
Counsel for Petitioners

Of Counsel:

L. Y. SADLER, JR.
Post Office Box 516
Camden, Alabama 36726

J. GARRISON THOMPSON
PHILIP HENRY PITTS
Post Office Box 722
Selma, Alabama 36701

CERTIFICATE OF SERVICE

I, W. McLean Pitts, one of the Attorneys for the Petitioners, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 28th day of June, A.D. 1974, I served copies of the foregoing Petition for Writ of Certiorari on the several Respondents (including Intervenors), by mailing copies in duly addressed envelopes, with first class postage, prepaid, to their respective Attorneys of record as follows:

Charles S. White-Spunner, Jr.
United States Attorney
Federal Building
Mobile, Alabama 36601

J. Stanley Pottinger
Assistant Attorney General
United States Department of Justice
Washington, D.C. 20530

Brian K. Landsberg, Attorney
United States Department of Justice
Washington, D.C. 20530

John R. Scott, Attorney
United States Department of Justice
Washington, D.C. 20530

A. J. Cooper, Jr.
Attorney at Law
1308 West Turner Road
Prichard, Alabama 36610

Jack Greenburg
Norman Chachkin
Ten Columbus Circle
Suite 2030
New York, New York 10019

T. W. Thagard
Smith, Bowman, Thagard, Crook & Culpepper
600 Bell Building
Montgomery, Alabama 36104

Solomon S. Seay, Jr.
Attorney at Law
352 Dexter Avenue
Montgomery, Alabama 36104

W. McLean Pitts
Attorney at Law
Post Office Box 722
Selma, Alabama 36701

APPENDICES

APPENDIX No. 1

Constitutional Provisions
Pertinent Provisions of the Fifth Amendment

"nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, *without due process of law;*" (Italics by writer of Petition)

Pertinent Provisions of the Fourteenth Amendment

"nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX No. 2

UNITED STATES of America, Plaintiff-Appellant,
William P. Thompson, et al., Intervenors-Appellants,
Patsie Primm, as next friend of Bobbie Lewis Knight,
et al., Intervenors,

v.

WILCOX COUNTY BOARD OF EDUCATION et al.,
Defendants-Appellees.

Nos. 71-3018, 73-3534.

United States Court of Appeals,
Fifth Circuit.

May 2, 1974.

School desegregation case. The United States District Court for the Southern District of Alabama entered judgment, and the Court of Appeals thereafter remanded with directions, 454 F.2d 1144. The District Court, William Brevard Hand, J., entered supplemental order and report, and plaintiff and intervenors appealed. The Court of Appeals held that where school board had not demonstrated its will to operate system in manner calculated to remedy past discriminatory practices and achieve unitary status, district court should not have established parallel educational institutions less than a mile apart in one attendance area or permitted privilege of transfer to minority white students only; that in view of failure of traditional school-related organizations to foster unitary goals, district court should have accepted recommendation for creation of advisory committee drawn from entire county; and that entry of findings of fact and conclusions of law with respect

to pending issues was appropriate to bring litigation to prompt and just determination.

Affirmed in part, reversed in part, and remanded.

1. Schools and School Districts (Key) 141(1)

It is not required that teachers in any system or any school be maintained at any arbitrary racial ratio, but there should be initial reassignment so that racial ratio at every school reflects systemwide ratio, followed by utilization of nondiscriminatory hiring, firing and assignment policy thereafter.

2. Schools and School Districts (Key) 13, 154

Where school board had not demonstrated its will to operate system in manner calculated to remedy past discriminatory practices and achieve unitary status, district court should not have established parallel educational institutions less than a mile apart in one attendance area or permitted privilege of transfer to minority white students only.

3. Schools and School Districts (Key) 13

In view of failure of traditional school-related organizations to foster unitary goals, district court should have accepted recommendation for creation of advisory committee drawn from entire county.

4. Schools and School Districts (Key) 141(5)

Where parties to school desegregation case were under directive from district court to prepare additional consent decree with respect to status of defense and emergency certified teachers, and it appeared that issue would have careful attention of district court, Court of Appeals would not require entry of any specific order upon appeal.

5. Schools and School Districts (Key) 159½

Solution of complex problems interwoven into creation and operation of efficient nondiscriminatory transportation system for county schools was responsibility of district court in first instance, and Court of Appeals would not act where district court had assumed supervision of issue.

6. Schools and School Districts (Key) 13

Fixing of specific times for accomplishment of desegregation goals was issue for district court in first instance, and Court of Appeals would not interfere where it did not appear that district court was unwilling or unable to require compliance with Supreme Court's time-urgency mandate.

7. Schools and School Districts (Key) 159

Any asserted violations of consent decree enjoining assessment of any course fees except those traditional within school system were to be first considered by district court.

8. Schools and School Districts (Key) 13

Issue of appointment of receiver in school desegregation case was for initial determination by district court, and Court of Appeals would not consider question until district court had considered and decided issue.

9. Schools and School Districts (Key) 13

Entry of findings of fact and conclusions of law in school desegregation case with respect to pending issues was appropriate to bring litigation to prompt and just determination.

Appeals from the United States District Court for the Southern District of Alabama.

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM:

Litigation with regard to the Wilcox County, Alabama school system began in November of 1965. At that time, the then totally segregated system enrolled 4300 black and 1500 white children. The latest semi-annual report of the Wilcox County School Board (School Board) discloses that at the opening of the Fall 1973 session the system enrolled 3,733 black and 109 white students.[1] All but four of the white students in the system now attend Wilcox County High School. The system's subsequent history discloses a rapidly declining white enrollment. Economically the county is among the nation's poorest, and some of the impediments to achieving a unitary school system are directly attributable to fiscal disabilities under a system

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1. The school by school enrollment is as follows:

	Non-White	White
ALBERTA (B)	120	0
BOYKIN (B)	178	0
CAMDEN ACADEMY (GRADES 1-6)(B)	310	0
CAMDEN ACADEMY (GRADES 7-12)(B)	646	0
MOORE ACADEMY (W)	365	1
PINE HILL CONSOLIDATED (GRADES 1-4)(B)	361	2
PINE HILL CONSOLIDATED (GRADES 5-8)(B)	395	1
PINE HILL HIGH SCHOOL (W)	345	0
TATES CHAPEL SCHOOL (B)	174	0
WILCOX COUNTY HIGH SCHOOL (W)	466	105
WILCOX COUNTY TRAINING SCHOOL (B)	177	0
WILLIAM J. JONES HIGH SCHOOL (B)	196	0
TOTAL—	3733	109

(B) Formerly all-black school

(W) Formerly all-white school

of financing in which declining enrollment and lack of local effort reduce state funding. The present appeal was initiated by the United States, the original plaintiff in the litigation, after the district court's order and report dated September 26, 1973. The United States urges error in the district court's imposition of a *minority* to minority transfer policy, its refusal to implement the plan submitted by the Title IV Center of the University of South Alabama (Title IV Center) insofar as this plan called for the consolidation of the formerly all-white and all-black schools in the Camden attendance area, and the court's refusal to create a countywide Advisory Committee.

An appeal has also been taken by the plaintiff-intervenors (a group comprised of national churchmen, teachers, students and parents of students in the school system). These intervenors raise the same three contentions as are advanced by the United States. In addition, they urge as error the district court's failure to order back pay relief for certain defense and emergency certified teachers whose contracts were not renewed, the refusal to adopt the Title IV Center's transportation plan, the failure to require immediate action to accomplish the matters covered in our mandate of January 10, 1972, the failure to prohibit the charging of janitorial fees to students, the refusal on financial grounds to order full implementation of the Title IV Center plan and to appoint a receiver, the failure to adopt findings of fact and conclusions of law, the failure to require the defendant Alabama State Department of Education to provide professional and economic assistance to the School Board and the postponement of the entry of an order requiring the payment of legal fees to the attorney representing the intervenors.

These appeals were collectively docketed as Cause No. 73-3543 and were consolidated with the prior and still

pending appeal, Cause No. 713018. This court held a pre-hearing conference pursuant to FRAP 33. Subsequently the parties have filed supplemental briefs and have reached agreement on the issue of attorneys' fees; this issue has now been resolved and is embodied in a decree of this court entered on February 25, 1974.

On March 7, 1972, the district court entered an order pursuant to this court's mandate of January 10, 1972 which directed the School Board to:

(1) desegregate the faculty and staff of the district pursuant to Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir. 1970);

(2) institute majority to minority transfer and notice provisions pursuant to Ellis v. Board of Public Instruction of Orange County, Florida, 423 F.2d 203 (5th Cir. 1970);

(3) reexamine and, if necessary, reconstitute, the district's transportation system pursuant to *Singleton, supra;*

(4) adopt policies covering construction, site selection and student transfers pursuant to *Singleton, supra;*

(5) file semi-annual reports as required by United States v. Hinds County School Board, 433 F.2d 611 (5th Cir. 1970); and

(6) report to the district court by March 30, 1972 as to Items (1), (2) and (3).

On October 5, 1972 a consent order was entered which stipulated documents and testimony of teachers and ordered the School Board to:

(1) achieve accreditation in every district school where financially possible;

(2) request the Title IV Center to evaluate the system and make recommendations as to accreditation;

(3) assure that school children get textbooks made available by the State Department of Education;

(4) cease charging $7.50 per semester to students for janitorial service;

(5) institute the teacher and staff criteria set out in United States v. Texas Education Agency (La Vega School District), 459 F.2d 600 (5th Cir. 1972);

(6) reinstate 16 named teachers with back pay;

(7) consider under non-racial criteria the entitlement to reinstatement of 14 defense and emergency certified teachers, but without back pay unless the court so orders;

(8) report by November 10, 1972 on all teacher actions.

The State Department of Education was ordered to assist in achieving accreditation and report to the court thereon. On this same date the court advised the parties in open court that further non-compliance by the School Board with the spirit and intent of its orders would result in the issuance of a contempt citation.

[1] On May 15, 1973 the court entered an order requiring the School Board to properly administer all phases of the Title I program. In a separate order of the same date, it enjoined the School Board, as to traditionally black schools in the system, to:

(1) upgrade deficient facilities according to the recommendations of the Title IV Center;

(2) maintain adequate sanitation in restrooms;

(3) keep buildings in minimum repair;

(4) protect students from and adequately ventilate open heating stoves.

The School Board was further ordered to:

(a) remove from the records of all black students entries reflecting their expulsion for attempts to enroll at Wilcox County High School and assist such students to make up time and credits lost due to expulsion;

(b) develop a uniform student disciplinary code;

(c) end racial discrimination against students as to service, facilities and extra-curricular activities; and

(d) end racial discrimination as to parents and the public in school-related matters, graduation exercises, athletic activities and parent-teacher meetings.

The State Board of Education and the State Superintendent of Education were ordered to comment on the educational desirability of implementing the school plan originated by the Department of Health, Education and Welfare. Finally, the court ordered the School Board to:

(1) maintain *Singleton* faculty ratios while accommodating teachers, schools and minimizing the hardships of reassignment;[2]

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2. No decision of this court requires that the teachers in any system or at any school be *maintained* at any arbitrary racial ratio. *Singleton* contemplates an initial reassignment so that the racial ratio at every school reflects the systemwide ratio, followed by the utilization of a non-discriminatory hiring, firing and assignment policy thereafter. *See, e. g.*, Carter v. West Feliciana Parish School Board, 432 F.2d 875 (5th Cir. 1970).

(2) keep records of all student transfers out of the system;

(3) maintain inventories of additional materials;

(4) act wherever possible to reduce teacher-pupil ratios, and

(5) supplement the Board's semi-annual reports with special information on the items covered by the concluding portions of this order.

On September 26, 1973 the district court entered an order and report, expressly in response to our January 10, 1972 mandate, which required the establishment of a 12-grade school at Camden Academy and a separate 12-grade school within the same attendance area at the Wilcox County High School facility. The remaining recommendations of the Title IV Center report filed on June 28, 1973 relating to school district consolidations and pupil assignments were adopted by the court. The School Board was ordered to annually file copies of its operating budget and property inventory with the court. School principals were ordered to properly account for funds. The School Board was prohibited from making capital expenditures without prior court approval. The School Board was ordered to:

(1) report new funds and fund sources to the court;

(2) make teacher assignments pursuant to *Singleton*;

(3) provide janitorial service, maintenance and upkeep for each school;

(4) adopt the Title IV Center's suggested Handbook of Student Rights;

(5) evidence its overall intent to comply with all Title IV Center recommendations, except as to Cam-

den area consolidations and as to the creation and utilization of a countywide advisory council.

The order prohibited the introduction of dogs or weapons upon school campuses, and enjoined all parties to seek outside financial assistance for the system and pretermitted ruling on attorneys' fees.

THE MAINTENANCE OF DUAL SCHOOLS IN THE CAMDEN AREA AND THE INSTITUTION OF A MINORITY TO MINORITY STUDENT TRANSFER POLICY

[2] The district court, in the face of a preponderant black student majority and a white student exodus, sought to preserve some semblance of racial integration by permitting the relative handful of white students to elect to concentrate themselves in a formerly all-white facility—the Wilcox County High School. To accomplish this the court established parallel educational institutions at Camden Academy and at Wilcox County High School, both located within a mile of each other in the Camden attendance area, and by permitting the privilege of transfer to white students only. Such an approach is not without some precedent. See, *Singleton, supra,* 419 F.2d at 1221 (St. John the Baptist Parish, Louisiana). In this case this court, en banc, found it unnecessary to require the division of a small number of minority whites amongst five schools in one portion of a predominantly black school system. However, neither the physical situations of the two school districts nor the remedies utilized by the court there and here are sufficiently similar to warrant affirmance. St. John the Baptist Parish is divided by the Mississippi River. Its East bank schools were operated by the district on an integrated basis. The district court permitted West bank students to exercise freedom of choice

in selecting the school they wished to attend. In contrast, the record here indicates that the Wilcox County School Board has yet to objectively demonstrate its will to operate this system in a manner calculated to remedy past discriminatory practices and achieve unitary status. In Wilcox County, the minority to minority transfer provision imposes a condition which is racially biased in every respect except literal appellation. If and when this School Board removes itself from the shadow of contempt, the district court may then consider whether a racially neutral freedom of choice plan could be of benefit in bringing about a unitary system. Because that day has not yet arrived, the district court erred in rejecting the general concept of the plan submitted by the Title IV Center for the consolidation of the Camden area schools, and in adopting a minority to minority transfer provision. These portions of the order appealed from are reversed. The district court is directed to implement the Title IV Center recommendations for Camden area schools effective at the commencement of the Fall 1974 school term.

COUNTYWIDE ADVISORY COUNCIL

[3] Believing that the school system was "over-committeed" and seeing no benefit from the creation of another school-related group, the district court rejected the Title IV Center's recommendation for the creation of an advisory committee drawn from the entire county. This court is advised that each school is now served by trustees who, under Alabama law, represent the interests of the school in general and who deal with the School Board in general matters regarding their particular school. Most, if not all, of the schools in the system also utilize the traditional parent-teacher organizations, which also function on an individual school basis. The record evidence of poor relationships and lack of communication between teachers,

students and their parents on the one hand and the School Board on the other, of open official encouragement of whites to frustrate unitary goals, and the fact that the district court considered it necessary to enjoin the School Board to permit the non-discriminatory function of parent-teacher associations as late as May of 1973, all operate to persuade this court that school trustees and parent-teacher organizations are not viable substitutes for a system-wide group chosen by the court to effect liason between the community, school officials and the court in the manner prescribed in *Singleton, Ellis* and *Hinds County, supra.* The district court is directed to create such a group promptly upon the remand of this case. Should the district court determine that the type of committee envisioned in the recommendation of the Title IV Center would be superior to a typical biracial committee, it may choose to implement that portion of their plan.

STATUS OF DEFENSE AND EMERGENCY CERTIFIED TEACHERS

[4] This issue raised by the intervenors was initially dealt with by the district court's decree of October 5, 1972. The United States represents that it was subsequently the subject of correspondence from the court to counsel on April 20, 1973, and that, on August 22, 1973, it filed a memorandum containing certain financial information in compliance with the court's request. The parties are presently under a directive from the district court to prepare an additional consent decree on this issue. The matter is one which should be resolved by the district court in the first instance. We do, however, note that the United States continues to contend that six other black teachers were discriminatorily dismissed in November 1971. We are confident that the entire area of discriminatory teacher and staff dismissals and pay entitlement,

which was a matter covered by our 1972 remand, will have the careful attention of the district court. We decline to require the entry of any specific order on this matter in the present appeal.

THE TITLE IV CENTER'S TRANSPORTATION PLAN

[5] In its order of March 7, 1972 the district court expressly ordered the reexamination and reconstitution of the School Board's transportation system under *Singleton, supra.* In its order of September 26, 1973 it clearly indicated approval of the concepts contained in the Title IV Center plan and provided that compliance with the court's mandate would be measured by the amount of implementation of the Title IV Center plan which the School Board could achieve. As with teacher and staff discrimination problems, solution of the complex problems interwoven into the creation and operation of an efficient non-discriminatory transportation system for Wilcox County schools must be the responsibility of the district court in the first instance.

FIXING SPECIFIC TIMES FOR ACCOMPLISHMENT OF DESEGREGATION GOALS

[6] Here again it is for the district court to determine whether the adoption of a timetable is a worthwhile step in dealing with the myriad problems of desegregating the Wilcox County School system. On the basis of the present record, we are not convinced that the district court is unwilling or unable to require compliance with the time-urgency mandate of Alexander v. Holmes County, 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19 (1969). We decline to require the adoption of such a timetable.

STUDENT FEES

[7] The present record is without evidence indicating that students are being assessed fees for the 1973-74 school year. Such assessments were specifically enjoined by the district court's order of October 5, 1972. Paragraph 12 of the order of September 26, 1973 requiring the School Board to provide janitorial service, does not provide for the collection of any student fees and none may be collected. The assessment of any course fees except those which have been traditional with this school system, was enjoined by the consent decree of October 5, 1972. The terms of that order are correct and are sufficient to cover the claims advanced here. Any asserted violations should be considered by the court below.

COMPLETE IMPLEMENTATION OF TITLE IV CENTER PLANS AND APPOINTMENT OF A RECEIVER

[8] We do not interpret the district court's order of September 26, 1973 to require any less than the fullest possible implementation of the Title IV Center plan (except as discussed first above) which the financial resources of the county and system will permit. Plan implementation is made the standard for School Board compliance with the spirit of the court's decree. The desirability of further specific relief as to particular portions of the plan should be addressed to the court below. The record does not demonstrate any inability of the district court to discharge its judicial functions in this cause without the assistance of supporting personnel in the form of a receiver or some type of special master. No finding to this effect has been made. Until that court considers and decides the issue, any directive by this court to take such action would be premature.

FAILURE TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW

[9] The January 10, 1972 mandate of this court directed the district court to supplement the record in this case with findings of fact and conclusions of law as to whether maintenance and equipment were being handled by the district on a non-discriminatory basis, whether student expulsions and suspensions and textbook distribution were non-discriminatory, whether the School Board had discriminated in discharging, hiring or promotion of faculty or staff, and the manner in which actual pupil results under the court's plan compared with the attendance projected under the plan initially submitted by the Department of Health, Education and Welfare. While some of these areas are now moot, there does appear to be a desirability, if not a necessity, for the court to enter findings and conclusions as to some of these areas and others discussed on the present appeal. An order by the district court making specific fact determinations on the issues now pending should be made to provide for this cause the bench marks essential to charting a course which will bring this litigation to the most prompt just determination possible.[3]

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3. The United States proposed findings of fact and conclusions of law to the court below and such findings do not appear to have been challenged. Whether all or any portion of these findings are to be used is of course for the district court to determine initially.

DIRECTIONS TO THE DEFENDANT, ALABAMA STATE DEPARTMENT OF EDUCATION TO PROVIDE PROFESSIONAL AND ECONOMIC ASSISTANCE TO THE WILCOX COUNTY SCHOOL BOARD.

In its order of October 5, 1972 the court ordered the State Department of Education to assist the School Board as to matters of accreditation. In its order of May 15, 1973 the State Board and the State Superintendent of Education were ordered to comment on the educational disability of the Health, Education and Welfare plan and to recommend alternatives. The order of September 26 enjoins all parties to seek outside financial assistance and to assist the Board with other financially related efforts. The Board has taken the position that its direct financial involvement is limited by Alabama law to allocation of funds based upon average daily attendance and that it has no authority to make "a special case" of Wilcox County. Without prejudice to further consideration of the need for specific relief of this type, we decline to require action in this regard now.

The order appealed from is in part affirmed, in part reversed, and the cause is remanded for further consideration not inconsistent with this order.

Affirmed, in part; reversed, in part; and remanded.

APPENDIX No. 3

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION

NO. 3934-65-H

UNITED STATES OF AMERICA,
Plaintiff,

WILLIAM P. THOMPSON, et al.,
Plaintiff-Intervenors,

vs.

WILCOX COUNTY BOARD OF EDUCATION, et al.,
ALABAMA STATE BOARD OF EDUCATION et al.,
ALABAMA STATE SUPERINTENDENT OF
EDUCATION, et al.,
Defendants.

Order and Report

(Filed September 26, 1973)

Predicate

This case has been on the docket of this Court since its filing on November 22, 1965. On October 1, 1971 the posture of the case was that an appeal had been taken to the Court of Appeals by plaintiffs-intervenors from an Order of the Court entered September 1, 1971 decreeing implementation of a desegregation plan prepared by HEW but modified by the Court. On September 21, 1971 and after notice of appeal had been given, the United

States filed an application moving for an Order of enforcement of the September 1st desegregation plan. The record in the case was transmitted to the Court of Appeals on September 30, 1971. It was in this posture that the present judge, devoid of any experience in this matter, took over the management of this case on the date of his induction to office, to-wit, October 1, 1971.

History

On January 10, 1972, the Court of Appeals for the Fifth Circuit mandated this Court to take certain affirmative steps in regard to the desegregation of Wilcox County schools. Among these required steps were the desegregation of the faculties and staff in accordance with *Singleton v. Jackson Municipal School District*, 419 F.2d 1211; the institution and implementation of a system-wide procedure for majority to minority transfer as approved in *Ellis v. Board of Public Instruction of Orange County, Florida*, 423 F.2d 203; re-examination and reconstitution if necessary, the transportation system in accordance with *Singleton*; and to require the filing with the District Court of semi-annual reports of a nature as required in *United States v. Hines County School Board*, 443 F.2d 611. In addition, this Court was to conduct further hearings as to other matters therein specified and to make such other or further orders as might be appropriate by reason of the content of such hearings, and to report the results of all of this back to the Court of Appeals.

In order to put these and other issues in perspective, it is felt necessary to review the case from an historical standpoint. Without going into each and every Order and proceeding involved, the Court wishes to note the following:

The original complaint was filed by the United States of America against the Wilcox County Board of Education, the then members of the Wilcox County Board of Education, the then Superintendent of Education of Wilcox County, the then State Superintendent of Education and the State Board of Education, was brought under and pursuant to the provisions of the Civil Rights Act of 1964. This complaint charged that Wilcox County operated fifteen (15) exclusively all-Negro schools and three (3) exclusively all-white schools. The record indicates that at that time there were approximately 4,300 black children attending the black schools and 1,000 white children attending the white schools.

It was further contended in the complaint that the educational opportunities and facilities afforded the blacks were inferior to those afforded the whites; that the Board of Education, though notified of this condition, and having had time to correct it, had failed to respond; that an injunction by the Court was mandated requiring the school system to desegregate and to provide equal facilities for all; and prayed that such injunction issue forthwith.

On March 16, 1966 a motion for leave to intervene was filed by William P. Thompson, Moderator of the General Assembly of the United Presbyterian Church; by Dr. Eugene Carson Blake, Clerk of the Assembly, the United Presbyterian Church; Marshall L. Scott, Chairman, and Dr. Gayraud Wilmore, Executive Director of The Commission of Religion and Race of the United Presbyterian Church.

On March 31, 1966 an Order was entered granting leave to the Presbyterian Church and others to intervene.

On April 7, 1966 the Wilcox County Board answered the complaint filed by the Government and on April 12, 1966 the Board answered the complaint in intervention.

On May 26, 1966 a motion for leave to intervene was filed by Albert J. Gordon, Valerie Watts, Vashti Jones Hayes, Jessie J. Lymons, which said motion was granted. These plaintiffs in intervention were alleged to have been teachers in the system.

On the same day, May 26, 1966, a notice and motion for leave to intervene was filed by Patsie Prim, et al., who were alleged to be students or parents of students attending the schools of the system. This motion was also granted.

Other parties litigant were subsequently added. On September 12, 1966 one Dan Harrell was made an additional party defendant. On May 19, 1966 the Alabama State Teachers Association, Inc. moved for leave to intervene, and on August 1, 1969 the National Education Association, Inc. also moved for leave to intervene. These instances are noted principally for the reason that they reflected changes in the course of the litigation occurring from time to time and issues that were then involved. By Order entered October 4, 1972 Judge Thomas denied leave of the Alabama State Teachers Association, Inc. to intervene.

Though it is quite interesting and informative to review this entire file minutely as to the number of hearings that were conducted, the number of appeals that have been taken, and the quantum of discovery that has occurred, it would not do to bore this report or the appellate court with such an undertaking. Indeed, because of the number of reviews that have heretofore taken place, the Court is aware of the fact that the appellate court has had ample opportunity to do this already. However, from the historical view it should be noted that this case, like others, has evolved with the changing law in regard to desegregation of the southern schools under the 1964

Civil Rights Act. It is also appropriate to note that considerable heat had been generated by the litigation and all sides might justifiably claim that they have been harassed and harangued, coerced and intimidated, threatened and cajoled, and prosecuted and persecuted; and in that claim, each would be correct. The United States Government has drycleaned the School Board's records and activities on more occasions than this Court can count. The private parties plaintiffs-intervenors have likewise done so; the HEW has done so; the FBI has done so; the NEA has done so, and this Court is of the definite conclusion that if there are any secrets still hidden from public view, those responsible for its seclusion might well be gainfully employed with the CIA. The Court also notes that all of this was not totally unnecessary because it is quite obvious to the Court that in a large number of instances the required information was most grudgingly given by the defendants, either because they didn't want to give it or it wasn't available and they didn't want anybody to know it wasn't available.

Plans for desegregation have been submitted and resubmitted, tried and rejected, implemented and thwarted, approved and disapproved, until it is difficult to now intelligently comprehend just what is the viable plan under which the School Board is required to operate for the purpose of complying with the Civil Rights Act and the Constitutional mandates.

In compliance with the Order of the Court of Appeals a very lengthy hearing was conducted in Mobile on February 16, 1972 and eventually being concluded in Selma, Alabama on March 31, 1972. The testimony covered a wide range of issues involved in the efforts to desegregate the schools, including the distribution of equipment, the condition of the buildings, the method of transportation,

the assignment of students, the assignment of teachers, etc. In the main this testimony reflected the pique of the parties involved and the fact that the facilities were substandard at best. Also, much was said concerning potbellied stoves, unpainted beaded walls, outside latrines and incandescent bulbs vis-a-vis fluorescent lights. The availability of testbooks was discussed, the quality of instructors was pointed out, the available acreage was discussed and at the conclusion of the hearings the parties were instructed to prepare and submit to the Court findings of fact and conclusions of law, but due to the comprehensive nature of the hearings the transcript of the record was extremely slow in forthcoming and by the time it was completed, conditions had changed again.

One of the great problems in this and similar litigation seems to be that each year brings a new set of facts to the issue, which in large measure changes the entire posture of the problem. This is particularly so as it applies to Wilcox County, where the ratio of black to white is so great. Therefore, that which may have been a viable order at the commencement of a school term is no longer so at the end of the school term. This was the condition which the Court noted at the time that it entered its Order of October 5, 1972 in which the parties to the litigation were directed to confer with one another and agree on the solution to problems where this could be done and to certify to the Court those areas of conflict where resolution was impossible. At the time this Order was entered the Court, in rather strong language, made it perfectly clear to all attorneys and parties litigant that the processes of this Court would no longer be trifled with, that the law had substantially jelled and that the direction that the parties should take was no longer impossible to discern and that all, being officers of the Court and subject to the law, knew what they had to do.

As a result of this Order this Court had been presented with a series of Orders covering each area of controversy defined by the Mandate of the Court of Appeals of January 10, 1972. These Orders resulted from petitions filed by the United States Government and joined in by the plaintiffs-intervenors, and each of them, in substance, has been adopted as prepared and presented by the United States Government. The entering of such Orders was on the basis that they resolved the issues contained and the Court believed that it did.

It will be noted that these Orders covered the issues of the upgrading of facilities, the reinstitution of students expelled from the schools, the adoption of uniform disciplinary codes, the transportation of students, the integration of extra-curricular activities, the consolidation of schools, the transfer of students into and out of the system, the maintaining of inventories, the utilization of school facilities by PTAs, the semi-annual reports by the School Board, the re-employment of teachers and a host of other matters. Among other things ordered was that the parties defendant cooperate with the Title IV Center of the University of South Alabama in developing a plan that would enable the schools of Wilcox County to be upgraded to accredited school status and to provide relatively sound education for all of the students as nearly as could be within the financial capabilities of the county.

Again it was the belief of the Court that these Consent Orders entered by the parties resolved the areas of controversy.

All of these plans presented and all of the activities engaged in, including the requirement for majority to minority transfer, have resulted in the fact that by the close of the school year in 1973 the number of white students attending the public schools of Wilcox County approxi-

mated 250, and the number of blacks approximated 3,900. The number of schools had been reduced and where there were no longer any all-white schools there remained nine all-black schools. No complete facility was any longer accredited.

The loss of students and the transfer of students under the majority to minority provision resulted in some facilities being grossly over crowded and some being grossly under populated. The attendance zone lines established by the September 1, 1971 Order as proposed by HEW and modified in part by the Court, were no longer appropriate. All parties agreed at this juncture that immediate relief was dictated by these changing circumstances.

Wilcox County is reputed and reported to be the third poorest county in Alabama and by admission of all counsel, the thirteenth poorest county in the United States. This constant interference with the orderly process of the educational system in Wilcox County has had the effect of denying anyone who attended the system any reasonable expectation of obtaining any kind of decent or worthwhile education. It became apparent to all that there was a need to restructure the system and reassign pupils in order to maximinize the use of existing facilities within the financial capabilities of the county. The loss of students has meant the loss of considerable revenues under the provisions of the State laws dealing with allocation of states funds.

The Title IV Center of the University of South Alabama presented a plan which it considered appropriate to consolidate the schools and to provide a viable educational system. The Wilcox County School likewise presented a plan which it represented to the Court would accomplish the same result, and counsel for all parties advised this Court at the time of a hearing on this issue that

neither plan served to resegregate the schools. The principal objection of the Wilcox County School Board to the Title IV plan was that it was economically unfeasible and could not be implemented within the financial capabilities of the county. The Government, in its motion requesting the implementation of the Title IV plan, alleged and averred that the Title IV plan would result in economies. The Title IV plan goes into considerable detail in reorganizing and restructuring the entire educational process of Wilcox County as well as the tax structure of that county. Indeed, the plan itself goes well beyond this Court's conception of its obligations and legal limits of involvement in the administration of school systems. A review of the plan shows that it contains much to commend it to the consideration of the School Board for it is obviously developed by a team well qualified to consider the processes of education. The Court should note, however, in passing, that though the representatives of Title IV who explained their plan to the Court at a conference conducted in Selma on Sunday morning, September 9, 1973, stated that it was intended to "benefit the kids", that some of these educators were not totally academic in their approach to the problem, but were somewhat partisan for they expressed the feeling that any alteration of their proposals insofar as consolidation was concerned would result in "the whites winning". This Court is not concerned with who wins or loses, for this Court considers that all win when justice is done and if any students, white or black, is driven from the system for whatever reason, justice is not done.

As the opening of the school year for 1973-74 was close at hand, the consolidation plan of the Wilcox County Board was implemented. This brought down the roof and those white citizens of Wilcox County who were content to leave their children in the public school rose up in protest. The opening day statistics of the schools reflected that only

approximately 100 white students presented themselves for registration. Less than this number actually enrolled. Because of numerous complaints registered by these parents, none of whom had ever been given an opportunity to express their opinions to the Court, the Court scheduled a hearing to be conducted in Selma, Alabama commencing Saturday, September 8, 1973 and continuing through Sunday, September 9, 1973. The concerns of these parents, none of whom resisted desegregation, were demonstrated to be quite real and this Court became convinced that the results of both the Wilcox County plan and the Title IV plan, if implemented, would destroy the public school system of Wilcox County insofar as the white children were concerned and would render that system an all-black system which, for all practical results, it now is.

It is interesting to note that the Government likewise acquiesced with the Title IV Center that any alteration of the plan which they presented which would allow the few whites to return to the system would not be compatible with the desegregation of the schools. Failure in an effort to allow the whites to attend under the circumstances which it is apparent to the Court would be required will certainly result in the establishment of all-black schools. The Court considers the arguments of the Government specious for the system is for all intents and purposes an all-black system now, and if the plans of Title IV and the School Board were adopted without modification it would continue to be an all-black system though nominally designated an integrated system.

Court Involvement

The Supreme Court's decision in the *Charlotte-Mecklenburg*[1] case requires us to adopt desegregation plans

1. *Swann v. Board of Education*, 402 U.S. 1.

"calculated to work and calculated to work now". *Brown v. The Board of Education*[2] teaches us that minorities can be deprived if they are denied the equal opportunity to associate with all elements of society. Life teaches us that if we are to have a working relationship with our fellow man it comes from association with one another and an understanding of the problems of each other. If all of the whites of Wilcox County are, for whatever reason, driven out of the school system, the black children will be denied the opportunity to learn and understand the problems of the whites and the whites will likewise be denied the opportunity to understand and appreciate the problems of the blacks. Association with one another is in itself an educational tool and desirable. If the friction between the races is ever to be eliminated, this should be encouraged at all levels. Where better to begin than at the beginning! In a county such as Wilcox, 80% black, with a long long history of segregation, the magnitude of the problem is greatly enhanced. There must be a beginning and that beginning of necessity, in this county, must be small, and if a plan is to be required that is calculated to work and calculated to work now, it must of necessity take into consideration the realities of that life.

The involvement of the Court in the problems of desegregation is a Constitutional one and does not and should not require the Court to become involved in the educational processes that arise on a day-to-day basis. The Government has argued, in substance, that this Court should compel the adoption of the Title IV plan that was filed in this matter in its entirety. To do so could inject this Court into the day-to-day administration of the schools, the establishment of curriculum, the determination of qual-

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2. *Brown v. School Board*, 347 U.S. 483.

ifications of instructors, and so on. This Court is ill equipped to undertake this burden and indeed it would be beyond the scope of its authority. This Court is interested, however, that the Constitutional rights of the citizens of Wilcox County are even-handedly protected and in those areas where one segment of society has been denied those protections it is due to be corrected. The constant meddling of outsiders, of Governmental agencies, and indeed perhaps the Court, has all served to contribute to the demise of public education as a reality in Wilcox County and in so noting it is not to be overlooked that the School Board and its administrators have not been without fault, for much more could have been accomplished than has been, and if appropriate effort had been made, much of this involvement would have been obviated.

Plan

For the reasons outlined above and after considering the historical background of this situation and in an effort to form a realistic approach to the desegregation of the Wilcox County schools, and recognizing the fallability of all those who must of necessity be connected therewith, this Court is of the opinion that if either the plan presented by Title IV or the plan presented by the Wilcox County School Board, insofar as the consolidation of schools and students is concerned, is implemented that it will serve the office of driving most, if not all, of the remaining whites out of the system, and from the testimony presented to this Court, a large number of these children are just simply not being educated. Though there is a private school in Wilcox County, a large number of white children cannot afford to go to that school and recognizing practicality and human nature to be what it is, the parents of the remaining white children will not put their children

in situations where their child is the only child in a school or class. It is simply unjust and inequitable to create a situation where a child is not afforded the opportunity for an education if it can be reasonably done without violating the Constitutional rights of the other children, and where the adoption of a plan is possible that would accommodate both. As observed by the Supreme Court in the *Green*[3] case, if a plan is unworkable, the Court is instructed to adopt a workable plan, and recognizing that desegregation is a continuing process, as noted above, this Court is convinced that the only practicable, workable plan for the present is the establishment of one school to which this small minority of whites may go so long as they remain in the minority.

Order

It is therefore ORDERED:

1. That the prior Orders of this Court of March 7, 1972 implementing the requirements of the Mandate of the Court of Appeals of January 10, 1972 and the Orders of this Court of October 5, 1972 and May 15, 1973 are RATIFIED and AFFIRMED.

2. That at the Wilcox County High School in Camden, Wilcox County, Alabama, there is established a school consisting of Grades One (1) through Twelve (12) with a minority to minority transfer privilege thereto by all students in Wilcox County with transportation being provided by the Wilcox County Board of Education.

3. That at Camden Academy in Camden, Wilcox County, Alabama, there is established a school consisting of Grades One (1) through Twelve (12) for students attending the Camden attendance area.

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3. *Green v. County School Board*, 391 U.S. 430, 9.

4. That attached hereto and marked Exhibit "A" is a Pupil Assignment Plan for Wilcox County High School Grades One (1) through Twelve (12) and Camden Academy Grades One (1) through Twelve (12) in the Camden attendance area dated September 11, 1973, prepared by the Title IV Unit of the University of South Alabama in conjunction with the Superintendent of Education of the Wilcox County School Board; that said plan be, and the same is, hereby adopted.

5. That in all of the remaining attendance areas of the Wilcox County system the plan of consolidation of schools as proposed by the Title IV Unit of the University of South Alabama be, and the same is, hereby adopted.

6. That the Wilcox County Board of Education file with this Court a copy of its 1973-74 operational budget that it is compelled to file with the State Department of Education of the State of Alabama and at the time of such filing with the Alabama State Board of Education in order that there will be a simultaneous filing with this Court and the State Department of Education and every year thereafter until further ordered. It being understood by the Court that from time to time such operational budget may be revised or amended by the Wilcox County Board of Education and must be approved as prepared or amended by the Alabama State Department of Education; that a copy of any amendment or revision of this budget must be filed in this Court. That within five (5) days after the close of the school year all funds remaining in the accounts of the local schools shall be paid to the Wilcox County Board of Education to the account of said school. The Principal of each school will be responsible and shall maintain the proper accounting for funds coming into his hands, which said accounting is approved according to the Laws of the State of Alabama

and under the accounting system set up by the State Superintendent of Education.

7. That the Wilcox County Board of Education file with this Court an inventory of all of the school properties simultaneously with the filing of the budget as hereinabove provided for in Paragraph 6 of this Order except no amended inventory would need be filed with any amended budget; it being the intention of the Court that only annual inventories be filed with this Court. Said inventory shall include all new items purchased or accumulated from October 1st to September 30th of each year by schools. There is incorporated herein by reference the May 15, 1973 Order of this Court and amends it to require only annual inventories beginning with the inventory for the 1973-74 year with reports for the next two (2) years to be only to reflect decreases and increases of what was measured in the initial inventory report and every third inventory from the initial report to be a full and complete inventory.

8. That the Wilcox County Board of Education not make any capital expenditures without prior approval of this Court; that no capital improvements or expenditures will be made on the facility known as Wilcox County High School until adequate capital expenditures have been made on the remaining facilities in the Wilcox County system so that said remaining facilities will be equal to or better than the Wilcox County High School facilities; provided, however, that the Wilcox County Board of Education may make ordinary repairs on said facilities at Wilcox County High School in order to keep the same in the same condition that said facilities now are.

9. That the Wilcox County Board of Education will report to this Court any new source or additional funds

that are received by Wilcox County that may be used for capital outlay issues.

10. It is realized by the Court that certain intra-system teacher assignments and transfers will be necessary to implement this Order, and therefore the Court directs the Wilcox County Board of Education to make such assignments and reassignments of teachers as may be necessary to implement this Order consistent with *Singleton* and previous Orders of this Court.

11. No teacher, student, or administrator shall bring any dog or weapon on school property used for school purposes; however, this does not include the curtilage of a resident of a campus.

12. The central administration of the County Board of Education, without requiring or receiving reimbursement from the local schools, shall provide janitorial services sufficient to maintain the premises, indoors and outdoors, especially restroom facilities, food serving areas, classrooms, and hallways and in addition provide for preventative maintenance and upkeep.

13. The defendants shall adopt a handbook of students' rights and responsibilities setting forth rules, regulations, procedures, appeals, penalties, and definitions as prepared by the University of South Alabama Title IV Center in consultation with defendants, plaintiffs, parents, students and teachers.

14. The plan prepared and submitted by the Title IV Unit of the University of South Alabama (see Exhibit "B", in three parts, attached hereto, made a part hereof and incorporated herein) is recognized by all of the parties as a worthy endeavor with much to commend it to the School Board in developing a comprehensive educational program calculated to assure the best education possible

for all students. This Court considers that the intent of the Board to comply with this Order is an essential element of compliance by them with this Order. A measure of the compliance by the Wilcox County School Board with the intent of this Order will be the rapidity with which they are able to adopt the recommendations of the Title IV Center. It is therefore recommended that the Wilcox County Board of Education request the Title IV Center of the University of South Alabama to prepare a plan whereby the implementation of these goals may be evaluated, if necessary, and whereby the Title IV Center may document further needs beyond the scope of the present study. In addition, the Title IV Center is encouraged to make reports to the Court and to the parties with regard to the progress of achievement of these recommendations.

15. Though this Order of the Court is not a Consent Order, the parties have indicated to the Court an agreement, in substance, that the recommendations as contained in the Title IV study set out on Pages 22 through 42, inclusively, are immediate goals that can be obtained with the exception of the recommendation contained on Page 37 thereof and which deals with the "county-wide advisory council". The school system presently operates with trustees for each school, selected by the PTA and the School Board. The Court considers that there is much merit in having the maximum involvement by the interested parents of the community, but is also aware of the fact that you can over committee any organization. For the present, the present structure through the PTAs would appear to be sufficient and ought to be encouraged. However, if this proves ineffective, the Court, retaining jurisdiction, reserves the right to review this issue. The defendants shall include as a part of their reports to this Court as presently required, a statement in regard to steps taken

to implement these recommendations. In addition, all extra-curricular programs shall be allowed to be the same as existed in the Wilcox County County School System during the school year 1969-70 to the extent that the students shall respond thereto as it applies to contests, dances and other program activities.

16. Because of the lack of funds available to the Wilcox System, all parties shall join in an effort to identify all federal and private sources of funding and shall join in applications for such funds as might benefit the system and particularly in regard to repairs and maintenance of the facilities as set forth in Pages 17, 18, 19, 20 and 21 of Volume 1 of the Title IV report. The defendants shall prepare a detailed schedule of necessary construction, required equipment and other costs necessary to implement these recommendations, including architect's fees, engineering fees, the purchase of books, and educational equipment, but shall exclude therefrom the costs of construction of totally new facilities to be provided for by capital outlay funds. The allocation of capital outlay funds shall be reviewed by the defendants with the Title IV Center at the time proposed in order to re-evaluate the consolidation plan in the event further consolidation is indicated. Separate books of accounts and separate auditing procedures with outside auditors shall be employed as indicated or desired by any funding agency, but it is understood that any institution or institutions agreeing to provide any such funds may not require that the Wilcox County Board give up any of its controls or rights under the law over the school system. In the event outside assistance is not available, this will not relieve the School Board of a continuing effort to upgrade the facilities within the plan and future financial capabilities of the Board or the Orders of this Court in connection therewith.

17. There is the question of attorney's fees to be paid A. J. Cooper, attorney representing the private plaintiffs-intervenors. Though the Government initiated the lawsuit on behalf of the aggrieved parties, private plaintiffs have been allowed to intervene and have accomplished some considerable results. In the event this Order serves to terminate the present litigation involving the school situation in Wilcox County, an attorney's fee is due to be considered and will be the subject of a separate Order of this Court. In the event the litigation continues, it is the opinion of this Court that the allowance of attorney's fees would be premature at this time.

18. Any person, firm, corporation, or association interfering in any way with any of the terms and provisions of this Order or the implementation of same, upon being reported to this Court, may, if the Court deems advisable, be adjudged in contempt subject to the further Orders and Decrees of this Court.

19. In compliance with the Mandate of the Court of Appeals of January 10, 1972, the Clerk of the Court shall, upon receipt of the transcripts, forthwith transmit this Order and all other Orders entered since that date, together with said transcripts, pleadings and exhibits, to the Court of Appeals for review.

20. This Court retains jurisdiction of this cause for such other Orders as may be required.

DONE this 26th day of September, 1973.

/s/ W. R. Hind
United States District Judge

EXHIBIT "A"

WILCOX COUNTY

Pupil Assignment Plan for Wilcox County High School (Grades 1-12) and Camden Academy (Grades 1-12) in the Camden Attendance Area

September 11, 1973

I. PURPOSE.

The proposed plan desegregates Wilcox County High School (Grades 1-12) maintaining a majority black (51% or higher) student ratio for the school in its entirety, by applying a combination of zoning and random selection techniques to determine student assignments.

II. TECHNIQUES.

A. *Zoning.* Zones will be established so that outlying elementary schools in the Camden Attendance Area serve as "feeder" schools to the two high schools in Camden city.

1. *Boykin.* High school students (Grades 7-12) in the Boykin Attendance area will attend Wilcox County High School.

2. *Wilcox County Training School (Millers Ferry).* High school students in the Wilcox County Training School Attendance area will attend Camden Academy.

3. *Tates Chapel-Coy.* High School Students in the Tates Chapel-Coy Attendance Area will attend Camden Academy.

B. Random Selection Technique for Pupil Assignment. This technique will be employed for students (Grades 1-12) in the Camden City Area (the Wilcox County High School and Camden Academy Attendance area). The technique selects students at random to attend Wilcox County High School based upon the following conditions.

1. Capacity of facilities.
2. Achieving majority black student ratio for the desegregated Wilcox County High School.
3. Random selection will apply to families, not just individual students, and will be applied for each grade.

III. STRENGTH OF PLAN:

A. Complete Objectivity.

B. Establishes known "feeder" patterns from elementary schools to high schools, essential for planning and articulation purposes as well as economy and manageability of bus transportation.

C. Communities can relate to a particular school.

D. Keeps family units together.

E. Can be easily and functionally maintained year after year.

IV. PLAN DESIGN:

A. Establish maximum student capacity using permanent facilities for grades 1-12 at Wilcox County High School. Establish maximum student capacity at Camden Academy for immediate planning purposes.

B. Assign Boykin High School Students to Wilcox County High School; assign Millers Ferry and Tates Chapel-Coy High School students to Camden Academy.

C. No grade will have more than two sections of 30 students each, or 60 students per grade.

D. Register all white students from Wilcox County, by grade level, at Wilcox County High School. The deadline for initial registration will be Friday, September 14 at 5:00 p.m.

E. White students will be registered at Wilcox County High School up to the capacity quota on a first come-first serve basis. Beyond the capacity quota, white students will be enrolled at any other school in Wilcox County depending on availability of space.

F. Based upon the actual number of white students registered and based upon the number of high school students enrolled from the Boykin community, determine the number of black students to be enrolled for each grade in Wilcox County High School.

G. List, alphabetically, all black students, by grade, in the Camden city attendance area (Wilcox County High School and Camden Academy attendance area) using the 1972-73 class registers from both schools as the source of data.

H. Use random number tables and random selection techniques applied to the alphabetical list to select black students to attend Wilcox County High School based upon the number of seats available as determined in step F above. The random number tables and directions for their use is attached

as part of this plan. The entry point into the random table is number 16956, page 1 of Random Number Table arrived at according to the attached directions.

I. Assign black students by grade and family, employing the random technique to Wilcox County High School. All other black students in the Camden City area (Wilcox County High School and Camden Academy attendance area) will be instructed to enroll at Camden Academy.

J. Immediately inform the communities of this plan by media releases and written communications in order to avoid confusion and misunderstanding.

DATA:

Facility Capacity. The total permanent capacity of Wilcox County High School has been set at 555 student stations which consists of 18 regular classrooms, 1 gymnasium and 1 substandard classroom.

PROCESS FOR USING RANDOM NUMBER TABLES TO DEVELOP A RANDOM SAMPLE FOR CONDUCTING A PARENT SURVEY.

Step 1: *Determine sample size*

A decision must be made concerning the size of the sample to be selected. This decision will be influenced by the degree of differences between responses, because when extreme differences are expected, a larger sample is selected to increase the probability of getting all possible responses. However, samples can easily get too large. Cost of reproducing materials, delivering or sending the questionnaires, and compiling results are all expensive and limit sample size. The goal is to develop a sample

large enough to include all kinds of responses, at the lowest possible cost in time and money. It is important to consider that the information should be produced accurately but as cheap as possible, so that time and resources can be used in other places too.

In our case, a sample of 10% might be considered. Sample size would be 4000 x .10 or .400. If 400 returns are desired, perhaps 500 should be sent out. Costs could be estimated by the unit, one questionnaire, estimating:

paper/printing/assembly/sending,
5¢ each x 500 = $25

clerical time for distribution/

collection/assembly/computation,
25¢ each x 400 = $100

professional time for recording,

organizing, interpreting
2 minutes x 400 = 14 hours (approximately)

Computation time increases when returns are broken down into sub-sets, such as elementary/junior high/ senior high; black/white, and so on.

Make an estimate of costs expected and determine a sample size which will meet the needs of your situation.

Step 2: *Distributing the sample into sub-sets.*

If a complete list of all students was compiled *and* numbered, a sample could be selected from this list. Since this is not possible, one additional step will make it possible to draw a sample based on *individual school* lists. This only requires using the school as a sub-set, and selecting a sample from the school which is equal, as a percentage of the total sample, to the school's percentage of the total

system enrollment. For example, if the system is 4000 students, the sample size might be 400. To use individual school lists:

1. Compute what *percent* the total *school* enrollment is of the total *system* enrollment.
2. Multiply this percentage times the sample size total, 400, to determine the number of persons to be selected from that individual school for the sample.
3. Select the participants of the survey from that school using the school enrollment list. Follow directions included here to obtain *randomness.*

Example:

System enrollment: 4000
School X enrollment: 500
Sample size, total: 400

How many students must be selected from school "X"?

$$\text{Number to be selected} = \frac{\text{School "X" enrollment}}{\text{System enrollment}} \times \text{Total Sample Size}$$

$$\text{Number} = \frac{500}{4000} \times 400$$

Number = 50. students

Conclusion: Select 50 students from School X.

Randomness:

The "representativeness" of the sample means simply that the population of the sample, though smaller, is very much like the total school population. In order to realize this goal, you must use selection processes for choosing the sample which are not systematic or biased in any way.

The best way to accomplish representativeness is to select randomly from the whole population.

To select students randomly, a random number table is used. The school student list is numbered from zero to the last student. Then the random number table is entered at some accidental point, and followed to get the numbers of the students on the list. Because the table has five digit numbers, you will only use the last three or four, depending on the size of the school.

The first page of the random number table is for demonstration purposes only. We will indicate on that page certain features to accompany these directions. Do *not* use that page for selecting the sample.

How many digits are necessary?

If the school has one thousand students or more, use the last *four* digits of each five-digit number. If the school has 999 or less students, use the last three digits of the numbers. *Always* read the same number of last digits.

Figure 1 indicates the digits to use for a school of 999 or less.

How is use of the table begun?

Enter the table at a *random* point. One way is to close your eyes, point to a number with a pencil and begin. Figure 2 indicates where the pencil point might happen to fall on page 1 of the table. Start with this number, using the numbers of digits needed, as in 1.

After selecting a starting point?

Follow the columns of numbers down, to the black lines. Then begin the next column to the right. If you completely use all columns in that row, move to the next

section of columns below. See Figure 3 for the path of use, after starting with Figure 2, 91230. Of course, you would only use the last three digits, 91230.

What if the numbers are too big?

If you were using a list of students for a school of 180 pupils, and you began use of the table at 91230, you would read three digits, 91230. Of course, you would not have a student numbered 230. Therefore, go on to the next number. Again, this would be too large, 221. Move down another number. The same thing, the last three digits, 90753, are too large. Move down to each succeeding number in the column. Go to the next column. Not until you come to 85166 will you come to a number whose last three digits are between 001 and 180. Number 166 becomes the first pupil from the school selected for your sample. To save time, you can just write his number at the top of your list, and continue getting numbers until you have as many as you need. Figure 4 is the number which follows 85166. Reading 46051, we would include, on our list, number 051. Student 51 from the top of the school list is the second sample participant.

What is done with the list of numbers taken from the table?

The list should have as many numbers as the sample size required. Next, take the list of school students, which must include *all* students, and be either numbered from one to the number of students, or treated as though it was so numbered. Then, using your random list, get the information from the student list. This would be done as follows:

Random number list	Student list
85166	50. Jones, Betty
46051	51. Jones, Bob
15081	52. Jones, Kathy

And so on.

NOTE: All of the reliability of your survey results depend on applying random sampling procedures rigorously. Do *not* take shortcuts, or make little adjustments. *Do* follow these steps. They are tedious, but necessary. Only following these rules gives you the authority to suggest that the sample population selected is like the total population. By the way, this is called "cluster" sampling. Good Luck.

NOTE TO THE SUPREME COURT OF THE UNITED STATES:

The random list of numbers has not been reproduced as part of this, as it could serve of no value to the Court.

APPENDIX No. 4

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3018

UNITED STATES OF AMERICA,
Plaintiff,

WILLIAM P. THOMPSON, ET AL.,
Plaintiffs-Intervenors,

PATSIE PRIMM, as next friend of BOBBIE LEWIS KNIGHT, ET AL.,
Plaintiffs-Intervenors-Appellants,

versus

WILCOX COUNTY BOARD OF EDUCATION, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Alabama

(January 10, 1972)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

BY THE COURT: Pursuant to the provisions of 28 U.S.C.A. § 2106, this cause is remanded to the district court with directions to forthwith order the defendants to act now to desegregate the faculties and other staff of this entire school district in accordance with the requirements expressed in *Singleton v. Jackson Municipal*

Separate School District, 419 F.2d 1211 (5th Cir. 1970); to institute and implement systemwide procedures for majority to minority transfer of students and parent notification thereof as approved in *Ellis v. Board of Public Instruction of Orange County, Florida*, 423 F.2d 203 (5th Cir. 1970); to reexamine and, if necessary, reconstitute its transportation system in accordance with the requirements of *Singleton, supra*; to adopt policies covering school construction and site selection and transfers of students into or out of the district in accordance with the requirements of *Singleton, supra*; and to prepare and file with the district court semi-annual reports similar to those required in *United States v. Hinds County School Board*, 443 F.2d 611, 618-19 (5th Cir. 1970).

The district court is directed to hold a hearing as promptly as possible after the receipt of the mandate of this court to determine (a) whether the maintenance of buildings and the distribution of equipment within this school system has been and is being conducted on a racially non-discriminatory basis, (b) whether students have been expelled or suspended or denied grades or textbooks or otherwise distinctively treated on account of race or color or because of their exercise of any rights conferred by prior orders of the court below, (c) whether faculty members or staff employees of the school system have been discriminated against as to discharge or hiring practices on account of race or color, and (d) the actual pupil racial results by school and grade of the implementation of the plan approved by the district court's order of September 1, 1971, and the projected enrollment by race, by school and grade, in the Pine Apple, Camden and Pine Hills areas of the district, if the plan proposed by the United States Office of Education were now implemented.

The district court is directed to supplement the record now before this court with findings of fact and conclusions

of law as to each of the matters required to be heard in the paragraph next above as promptly after the conclusion of its hearing as can be expediently accomplished. If, as a result of such hearing, the court should determine that any provision in its prior decree not already directed to be modified by the first paragraph of this order, should, in its discretion, be amended or revised, then such revision or amendment may be implemented immediately and a copy of such revised order shall be included in the supplementary material furnished to this court.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1983

WILCOX COUNTY BOARD OF EDUCATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A17) is reported at 494 F. 2d 575. The opinion of the district court (Pet. App. A18-A45) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1974. A timely petition for rehearing was denied on June 7, 1974. The petition for a writ of certiorari was filed on July 5, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that it is constitutionally impermissible in the circumstances of this case to include in a school desegregation plan a minority-to-minority transfer provision under which white students may transfer to any school in the system and black students may transfer to none.

2. Whether the court of appeals correctly ordered the district court to implement educational recommendations designed to improve the quality of education and facilitate desegregation in the school district.

STATEMENT

The United States instituted this school desegregation suit involving the Wilcox County, Alabama, school system on November 22, 1965, in the United States District Court for the Southern District of Alabama, pursuant to Section 407 of the Civil Rights Act of 1964, 78 Stat. 248, 42 U.S.C. 2000c-6 (Pet. App. A18). The district court found that petitioners were operating dual school system based on race and ordered them to formulate a desegregation plan.[1] Thereafter, the court of appeals, upon the motion of the original and intervening plaintiffs, vacated the district court's order and remanded the case to the district court for reconsideration in light of *United States* v. *Jefferson County Board of Education*, 372 F. 2d 836, on rehearing *en banc*, 380 F. 2d 385 (C.A. 5).

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[1]The district court ruled that there was insufficient time to begin desegregation for the 1966-1967 school year. On August 25, 1966, the United States applied to the court of appeals for an injunction pending appeal, requesting that desegregation begin immediately. The court of appeals ordered the district court to implement a "freedom of choice" plan for the 1966 Fall term for grades 1-3 and grades 7-9. The district court thereafter restrained the petitioners from acting in any manner which would frustrate the freedom of choice plan.

The district court then formulated a "freedom of choice" desegregation plan for the Wilcox County School System. After this Court's decision in *Green* v. *County School Board*, 391 U.S. 430, the district court ordered the Office of Education of the Department of Health, Education, and Welfare, to draft a desegregation plan for a unitary school system.[2] With some extensive modifications, the HEW plan was approved by the district court.[3]

The private plaintiffs appealed. On January 10, 1972, the court of appeals remanded the case to the district court (Pet. App. A46-A48) with directions to order petitioners to desegregate immediately the faculty and staff of the school district, to institute system-wide procedures for majority-to-minority transfer of students, to re-examine the transportation system, to adopt policies covering school construction and site selection, and to prepare and file semi-annual reports (Pet. App. A46-A47). In addition, the district court was directed to hold a hearing to resolve certain specified issues (Pet. App. A47).[4] The United

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[2]The plan was to include provisions concerning desegregation of faculty and staff, majority-to-minority transfer policy, school construction and site selection, and attendance outside the system of residence.

[3]The district court rejected HEW's proposal to consolidate the schools in the system and adopted, instead, petitioners' plan, which was based on student attendance zones.

[4]The district court was directed to determine whether the school system was discriminating on the basis of race in disciplining students, in maintaining buildings and distributing equipment, and in hiring and discharging teachers. It was also instructed to determine the actual pupil racial results of the HEW plan as modified by the district court, and the projected enrollments, by race, of HEW's plan if it were to be implemented without modification.

States contended at that hearing that petitioners were operating a racially discriminatory school system with respect to each of the matters at issue.[5]

The district court adopted most of the educational recommendations made by the Office of Education's Title IV General Assistance Center at the University of South Alabama (Pet. App. A30-A36). The court rejected the Title IV Center's recommendations for pairing of the white and black schools in the Camden attendance area, requiring instead the establishment of a twelve-grade school at the traditionally white Wilcox County High.[6] It also added a minority-to-minority transfer provision.

Since the white students are a minority in the system as a whole and in each school within the system, the effect of the district court's plan would have been to permit every white student in grades K-12 to transfer to and attend a single school, Wilcox County High School. Black students, however, since they are in the majority in each school, would not have been free to transfer and would have been required to attend the schools to which they were assigned on the basis of geographic attendance zones.

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[5]Specifically, the United States contended that petitioners maintained buildings and distributed equipment on a racially discriminatory basis, denied black students books and learning materials on the basis of race, discriminatory disciplined black students who attempted to exercise their rights, segregated black students in classrooms, dismissed black teachers, aides, and other staff on the basis of race, and operated schools pursuant to a plan that held no promise to equalize educational opportunities.

[6]At the opening of the 1973-1974 school year, Wilcox County High enrolled 466 black students and 105 white students, while Camden Academy enrolled 956 black students and no white students (Pet. App. A5, n. 1). These schools are within a mile of each other (Pet. App. A11).

The court of appeals reversed the district court's order insofar as it failed to pair the schools in the Camden area and permitted minority-to-minority transfers. The court ruled that the Title IV Center's pairing recommendations for the Camden area schools should be implemented for the 1974-1975 school year (Pet. App. A12).[7]

ARGUMENT

The decision of the court of appeals is correct, and there is no reason for further review.

1. Petitioners contend that the minority-to-minority transfer provision was necessary to prevent "a totally black school system" (Pet. 12). But that provision would have precluded most black students from attending the only integrated school in the system. The court of appeals thus correctly concluded that, as applied in the context of this school system, "the minority to minority transfer provision imposes a condition which is racially biased in every respect except literal appellation" (Pet. App. A12).

The court of appeals correctly distinguished its prior *en banc* decision in *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211, 1221 (St. John the Baptist Parish, Louisiana), where a small number of minority white students were allowed to cluster in one portion of a predominantly black school system. In that case, black students from other attendance areas were also permitted to transfer to the desegregated school. As the court stated in the present case (Pet. App. A11-A12):

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[7]On July 30, 1974, Mr. Justice Powell denied petitioners' application for a stay.

> [N]either the physical situations of the two school districts nor the remedies utilized by the court there and here are sufficiently similar to warrant affirmance. St. John the Baptist Parish is divided by the Mississippi River. Its East bank schools were operated by the district on an integrated basis. The district court permitted West bank students to exercise freedom of choice in selecting the school they wished to attend. In contrast, the record here indicates that the Wilcox County School Board has yet to objectively demonstrate its will to operate this system in a manner calculated to remedy past discriminatory practices and achieve unitary status. * * * If and when this School Board removes itself from the shadow of contempt, the district court may then consider whether a racially neutral freedom of choice plan could be of benefit in bringing about a unitary system.

2. Petitioners also argue (Pet. 13-17) that the district court has no "authority to place into operation the Title IV Plan which is both impracticable and economically impossible for the Wilcox County system" (Pet. 15). They argue that the courts no longer have any legitimate function in this case, because "the school system has become a unitary system and all vestiges of a dual system have been eliminated" (Pet. 15).

The court of appeals stated to the contrary, however, that "the Wilcox County School Board has yet to objectively demonstrate its will to operate this system in a manner calculated to remedy past discriminatory practices and achieve unitary status" (Pet. App. A12). It accordingly concluded, correctly in our view, that, with the school board still in "the shadow of contempt," "the district court erred in rejecting the general concept of the plan submitted by the Title IV Center for the consolidation of the Camden area schools" (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

J. STANLEY POTTINGER,
Assistant Attorney General.

BRIAN K. LANDSBERG,
LAWRENCE L. NEWTON,
Attorneys.

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